(7)

No. 94-562

In The

Supreme Court of the United States

October Term, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A REPRESENTATIVE OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE ORION INSURANCE COMPANY, PLC, SKANDIA U.K. INSURANCE PLC, THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE, LTD., OCEAN MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL ASSURANCE CO., LTD., PEARL ASSURANCE PLC, BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO. (UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE CO., (UK) LTD., SOVEREIGN MARINE & GENERAL INSURANCE CO., TOKIO MARINE & FIRE INSURANCE (UK) LTD., TAISHO MARINE & FIRE INSURANCE CO. (UK) LTD., STOREBRAND INSURANCE CO. (UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU INSURANCE CO. (UK) LTD.,

Petitioners,

v.

SEVEN FALLS COMPANY, MARGARET HUNT HILL, ESTATE OF A.G. HILL, LYDA HILL, ALINDA H. WIKERT, AND U.S. FINANCIAL CORP.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

I. Does the "exceptional circumstances" test apply to a federal district court's determination of whether to abstain from exercising its jurisdiction in a declaratory judgment action?

II. Should a trial court's decision to abstain in a declaratory judgment action be reviewed *de novo* or by an abuse of discretion standard?

III. Even if the "exceptional circumstances" test applies, was the district court's stay order proper?

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

Respondents file this Brief in Opposition to the Brief of Petitioners.

STATEMENT OF THE CASE

This is an insurance coverage dispute arising out of three underlying lawsuits, two of which were consolidated in the District Court of Winkler County, Texas. The third lawsuit is pending in the District Court in Dallas County and has been stayed in deference to the Winkler County litigation. R II 119. Each of the three underlying lawsuits involves a dispute over the ownership and/or operation of certain oil and gas properties located in Winkler County, Texas. R III 3.

Well prior to the Winkler County litigation proceeding to trial, Respondents (the "Hill Group") requested Petitioners ("London Underwriters") to provide them with coverage under several policies of commercial liability insurance issued by London Underwriters to the Hill Group. London Underwriters, pursuant to a series of letters dated July 31, 1992, refused to defend or indemnify the Hill Group in either the Dallas or Winkler County actions. R I 185-88, 204; R III 268. In late September, 1992 the consolidated Winkler County suits proceeded to trial. After a three week trial, a verdict in excess of $100 million was rendered against the Hill Group and others. R II 118-19.

London Underwriters were given notice of the Winkler County verdict by counsel for the Hill Group in late November, 1992. R II 145-47, 150 at ¶ 2. On December 9, 1993, before a judgment was even entered on the Winkler

County verdict and despite the fact that London Underwriters had previously denied coverage to the Hill Group for the Winkler County litigation, London Underwriters, anticipating litigation from the Hill Group and desiring to shop for the most advantageous forum, instituted Civil Action No. H-92-3749, a declaratory judgment action identical to this one, in the United States District Court for the Southern District of Texas. R I 261-63; R II 118; J.A. 23-26. London Underwriters' original suit was dismissed without prejudice pursuant to an agreement of counsel which required the Hill Group to give fourteen days notice of their intent to commence any future litigation against London Underwriters.[1] R II 118, 139-44, 150 ¶ 3.

Counsel for the Hill Group requested London Underwriters to dismiss their original declaratory judgment action primarily in order to avoid the possibility that the mere existence of London Underwriters' declaratory judgment action might jeopardize ongoing negotiations between the Hill Group and certain of their other insurers regarding the underlying Winkler County litigation. R III 3-4. The Hill Group maintained insurance coverage with these other insurers in the amount of at least $100 million. R III 3. The insurance coverage at issue in this action, while substantial in amount, would not have been sufficient to supersede the Winkler County judgment. R III 19. Thus, while it is true that these other insurers were the

[1] The provision requiring the Hill Group to give fourteen days advance notice prior to filing an action against London Underwriters was designed to preserve the status quo by allowing London Underwriters to retain their perceived advantage in having the first suit on file. R II p.141 ¶ 1.

Hill Group's primary target, at no time did the Hill Group represent that London Underwriters would never be a target or that they would never pursue claims under the policies at issue in this case. The fourteen day notice provision in the parties' letter agreement clearly evidences this fact. R II 141 ¶ 1.

On February 12, 1993, the Winkler County District Court entered a judgment on the jury's verdict. R III 4-5. Shortly thereafter, on February 17, 1993, the Hill Group's other insurers instituted a declaratory judgment action against the Hill Group. That action was styled *Ronald Malcolm Pateman, et al. v. Margaret Hunt Hill, et al.*, Cause No. 93-1658, and was filed in the 298th Judicial District Court in Dallas County, Texas. R III 4-5. The Hill Group instituted their own action against those other insurers in Dallas County on February 24, 1993. That action was styled *Margaret Hunt Hill, et. al. v. Ronald Malcolm Pateman, et al*, Cause No. 93-01929. R I 204 ¶7, 152-183, 224. The two Dallas County actions were subsequently consolidated in the 298th Judicial District Court.

In light of the fact that the Hill Group's negotiations with their other insurers had fallen through and become the subject of litigation, the Hill Group saw no point in further postponing resolution of all of their insurance coverage questions with all of their insurers. R III 5. Accordingly, on February 23, 1993, counsel for the Hill Group gave notice, pursuant to the terms of the letter agreement, of the Hill Group's intent to bring an action in state court against London Underwriters. R II 138, 150 ¶ 4. That same day, London Underwriters refiled this action. R II 1-110.

Thereafter, on March 26, 1993, the Hill Group filed their state court action against London Underwriters. R II 120-37, 150 ¶ 5. In the state court action, the Hill Group asserted claims against London Underwriters for, *inter alia*, breach of contract and breach of the duty of good faith and fair dealing. The state court action also names as Plaintiffs various members of the Hunt family and their related entities (the "Hunt Group") who are also judgment debtors in the Winkler County litigation. The Hunt Group is likewise asserting claims for coverage and for bad faith against its insurers, Underwriters Indemnity Company and Planet Indemnity Company, in the state court action. Contrary to London Underwriters' assertions, the claims of the Hunt Group against their insurers were properly joined in the state court action because the claims of the Hill and Hunt Groups are interwoven with one another in that they involve the same facts and issues.[2]

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[2] This case is really no different than any environmental coverage case involving a polluted property site which has been owned by multiple owners, each of whom have been insured by different insurers. Those cases are routinely tried together because they involve the same facts and issues, notwithstanding the fact that there are separate groups of plaintiffs having separate coverage claims against different insurers. *See, e.g.*, IELA Amicus Brief at p. 2, n. 2. Similarly, in this case, the pleadings and conduct at issue in the underlying lawsuits, upon which the carriers' duties to defend and indemnify will be adjudged, both involve the same facts and issues. The policies issued by the carriers for the Hunt and Hill Groups, while not identical, do contain similar insuring and exclusionary provisions. Thus, the same questions of law and fact which are crucial to the resolution of this dispute will also be necessary to resolve the Hunts' claims against their insurers. As a result, the claims were properly joined under Texas law. *See, e.g., State Dept. of Highways v. Cotner*, 845 S.W.2d 818, 819 (Tex. 1993).

On the same day that they instituted the state court action, the Hill Group filed their Rule 12 Motion to Dismiss or Stay in this case, requesting that this action be dismissed or stayed in deference to the state court action. R II 112-19. On June 30, 1993, the district court granted the Hill Group's Rule 12 Motion, staying this action pending resolution of the state court action. J.A. 23-26. The district court did not, as suggested by London Underwriters and the amicus parties, refuse to exercise jurisdiction based solely upon the mere existence of a concurrent state court proceeding. Petitioners' Brief at pp. 9, 17, 20, 24; IELA Brief at pp. 1, 3, 4, 6, 8, 9, 12, 19, 30; MLA Brief at pp. 12-13. Rather, in its order staying this action, the district court found that a stay was appropriate because (1) London Underwriters filed their original declaratory judgment action in anticipation of litigation by the Hill Group; (2) that action was filed as a means of forum-shopping; (3) London Underwriters' rights would adequately be protected in the state court proceeding in that London Underwriters could assert their claims in this action as defenses or counterclaims in the state court proceeding; (4) exercising jurisdiction in this case would result in piecemeal litigation; and (5) it would be inequitable to allow London Underwriters to gain precedence in the choice of forum. J.A. 25. The Fifth Circuit, finding no abuse of discretion in these determinations, affirmed the district court's decision. J.A. 27-30. London Underwriters now appeal these rulings to this Court.

SUMMARY OF ARGUMENT

This Court has made it clear on repeated occasions that a district court's decision to exercise jurisdiction over

a declaratory judgment action is a matter committed to the sound discretion of the district court. Concerns that federal courts have a virtually unflagging obligation to exercise jurisdiction are irrelevant in the context of declaratory judgment actions because Congress, in creating the Declaratory Judgment Act, specifically gave district courts discretion concerning whether to hear such actions. Thus, the judicially-formed "exceptional circumstances" test set forth in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) and *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1 (1983), which normally governs the determination of whether it is proper for a federal court to abstain from exercising its jurisdiction in a particular case, does not apply to declaratory judgment actions.

At least two prior holdings of this Court construing a federal court's discretionary exercise of its jurisdiction under the Declaratory Judgment Act compel the conclusion that the decisions of the courts below must be affirmed. First, in cases like the instant one where the first-filed complaint for declaratory relief does nothing more than assert a defense to an impending state court action not involving a question of federal law, this Court, in *Public Service Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237 (1952), has indicated that a federal court should not entertain jurisdiction. Second, in *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 495 (1942), this court determined that a court should not ordinarily exercise its discretion to hear a declaratory judgment action where, as is the case here, there is another suit between the parties pending in state court that presents the same issues not governed by federal law.

This Court's rationale in *Brillhart* for allowing district courts broad discretion in determining whether to exercise jurisdiction in a declaratory judgment action had three principal bases: (1) avoidance of having federal courts needlessly determine issues of state law; (2) discouraging litigants from filing declaratory judgment actions as a means of forum shopping; and (3) avoiding duplicative litigation. Each of these factors support abstention here. First, there is no dispute that this insurance coverage dispute is governed by state law. Second, the courts below correctly concluded that London Underwriters' brought this action in anticipation of litigation and that entertaining jurisdiction over this declaratory judgment action would reward London Underwriters' attempts to forum shop. Third, the courts below properly recognized that declining the exercise of jurisdiction in this case would avoid duplicative litigation. Thus, under both the holding and rationale of this Court's decision in *Brillhart*, the district court's decision to abstain from exercising its jurisdiction was entirely proper.

A district court's determination whether to exercise jurisdiction should be reviewable under an abuse of discretion standard. Such a standard has been employed by this Court in reviewing abstention determinations under both the Declaratory Judgment Act and under other abstention doctrines. However, regardless of the standard of review applied - *de novo* or abuse of discretion - either standard would have yielded the same result in this case. Even so, all of the factors relating to the allowance of broad discretion to the district court in determining whether to entertain a declaratory judgment action support an abuse of discretion standard. The standard is

consistent with not only the Declaratory Judgment Act, but with common sense. The district courts, in fulfilling whatever obligation they may have to exercise jurisdiction, should not be deprived of the discretion to decline jurisdiction over a declaratory judgment action where, as here, the declaratory judgment action is instituted as a means of forum shopping, no issue of federal law is presented, the declaratory relief sought is nothing more than a defense to the state court action, and maintenance of two parallel suits would result in duplicative, piecemeal litigation.

Finally, even if the "exceptional circumstances" test were applicable to a district court's determination of whether to exercise jurisdiction in a declaratory judgment action, the trial court properly refused to exercise jurisdiction in this case. The factual findings made by the district court demonstrate not only that abstention is proper under *Brillhart* and its progeny, but also that the requisite "exceptional circumstances" warranting abstention are present here. That the district court's findings also demonstrate the existence of such exceptional circumstances is not surprising since the *Colorado River/Moses H. Cone* factors themselves run substantially parallel to the criteria that have historically been deemed relevant to a court's determination of whether to accept or decline jurisdiction in a declaratory judgment action.

ARGUMENT

I. A Federal Court has the Discretion to Refuse to Entertain a Declaratory Judgment Action if There is a Pending State Action in Which all Issues can Effectively be Determined.

The unique nature of declaratory judgment actions forms the basis for the departure from the general rule disfavoring abstention. *See* 17A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4247 at 118-20 (2nd ed. 1988) (noting the special nature of a declaratory judgment as supporting abstention in a declaratory judgment action). Generally, abstention is disfavored and "exceptional circumstances" are required before abstention is proper. *Colorado River*, 424 U.S. at 813-819; *see also Moses H. Cone*, 460 U.S. at 14-16. When an action is one for declaratory judgment, however, the district court should have broad discretion to defer to a similar state action.

A. The Declaratory Judgment Act Does Not Obligate a District Court to Exercise its Jurisdiction in a Declaratory Judgment Action.

Declaratory relief, both by its nature and under the plain language of the Declaratory Judgment Act, 28 U.S.C. § 2201, is discretionary. *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (*per curiam*); *Cardinal Chemical Co. v. Morton Int'l, Inc.*, 113 S. Ct. 1967, 1974 n. 17 (1993). The Declaratory Judgment Act is uncommon in that it neither imposes an unflagging duty upon the courts to decide declaratory judgment actions nor grants entitlement to litigants to demand declaratory

remedies. *See Green v. Mansour*, 474 U.S. 64, 72 (1985). In other words, the Declaratory Judgment Act is an authorization, not a command. It gives federal courts competence to make a declaration of rights; it does not impose a duty to do so. *Rickover*, 369 U.S. at 112. *See also* Edwin Borchard, Declaratory Judgments at 231-41 (2nd Ed. 1941).[3] The legislative history of the Declaratory Judgment Act itself shows that "large discretion is confirmed upon the courts as to whether or not they will administer justice by the procedure." *See* H.R. Rep. No. 1264, 73rd Cong. 2nd Sess. at 2 (1934).[4] *See, also* 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2759 at 644 (1983) (noting that the draftsmen of the Declaratory Judgment Act rejected the view that the terms of Act were mandatory and did not leave any discretion in the court to refuse jurisdiction). Thus, the decision whether to exercise jurisdiction over a declaratory judgment

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[3] Edwin Borchard is a co-draftsman of the Uniform Declaratory Judgments Act. London Underwriters contend that Prof. Borchard supports their position that a district court must hear a declaratory judgment action. The opposite is true. Specifically, Prof. Borchard wrote: "There is nothing automatic or obligatory about the assumption of jurisdiction by a federal court even if the parties are proper and jurisdictional amount present." Edwin Borchard, Declaratory Judgments at 313 (2nd ed. 1941).

[4] Petitioners' representation of the content of the legislative history of the Declaratory Judgment Act is incorrect. Petitioners claim that the legislative history dictates that district courts *must* hear declaratory judgment actions. Petitioners' Brief at 22. Nowhere in the legislative history is there any such implied, much less, explicit requirement. The legislative history says the opposite. *See* H.R. Rep. No. 1264, 73rd Cong., 2nd Sess., at 2 (1934). In any event, this issue has been put to rest by this Court in *Brillhart*, *Rickover*, *Green* and *Cardinal*.

action is a matter committed to the district court's discretion. *Brillhart*, 316 U.S. at 492; *Cardinal*, 113 S. Ct. at 1974, n. 17.

The reason that the "exceptional circumstances" test does not apply to declaratory judgment actions also arises from the genesis of *Colorado River* and *Moses H. Cone*, as opposed to the origin of the Declaratory Judgment Act. One court determined that the importance of *Colorado River* and *Moses H. Cone* "lay in the fact that the Supreme Court gave its imprimatur to a judicially formed rule of abstention based mainly on notions of judicial economy in an era of severely crowded federal dockets." *U.S. Fidelity & Guar. v. Algernon-Blair, Inc.*, 705 F. Supp. 1507, 1521 (M.D. Ala. 1988); *see also* Howard A. Davis, *The Doctrine of Abstention to Promote Judicial Administration*, 33 Trial Law. Guide 564, 564-66 (1990) (noting that the goal of *Colorado River* is wise judicial administration); Michael T. Gibson, *Private Concurrent Litigation in Light of Younger, Pennzoil, and Colorado River*, 14 Okla. L. Rev. 185, 187-91 (1989).

In its analysis, the *Algernon-Blair, Inc.* court stated that this Court was so wary of approval of the practice of abstention for inappropriate grounds that it imposed severe restrictions on the discretion of the lower courts. *Algernon-Blair, Inc.*, 705 F. Supp. at 1521. Such a policy concern does not apply to declaratory judgment actions. In contrast, a district court's discretion over declaratory judgment actions originates in Congress, which has authority to design such statutory relief. Congress gave the court discretion in determining whether to exercise its authority. *Id.*; 28 U.S.C. § 2201; David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L.Rev. 543, 548 n. 24 (1985).

Thus, the exceptional circumstances test does not apply to declaratory judgment actions, because the concerns that prompted articulation of the test (e.g., that the federal courts have a "virtually unflagging obligation to exercise the jurisdiction given them," *Colorado River*, 424 U.S. at 817), are irrelevant in an action for declaratory relief under 28 U.S.C. § 2201, where the court is under no compulsion to exercise its jurisdiction.

Petitioners' argument that this Court's intervening decisions in *Colorado River* and *Moses H. Cone* have modified the abstention analysis applicable in declaratory judgment actions is misplaced. Petitioners' Brief at p. 17. In fact, the opposite is true. Subsequent to the decisions in *Colorado River* and *Moses H. Cone*, this Court has steadfastly adhered to its position in *Brillhart* that federal district courts are under no compulsion to exercise their jurisdiction in declaratory judgment actions and that the decision whether to defer to the concurrent jurisdiction of a state court is committed to the district court's discretion. *Cardinal*, 113 S. Ct. at 1974, n. 17; *Green*, 474 U.S. at 72.[5]

B. Abstention was Proper Because this Case is not an Appropriate One for Declaratory Relief.

As established above, district courts have discretion to exercise jurisdiction in declaratory judgment actions.

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[5] *See also, Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 664 (1978) (plurality opinion), wherein now Chief Justice Rhenquist, after the decision in *Colorado River*, specifically indicated that the language from *Colorado River* referring to a federal court's virtually unflagging obligation to exercise its jurisdiction does not undermine the holding of *Brillhart* that the decision on whether to defer to the jurisdiction of a state court remains a matter committed to the district court's discretion.

However, in cases like the instant one where the complaint for declaratory relief seeks solely to assert a defense to an impending state court action not involving a question of federal law, a federal court should not entertain the claim for declaratory relief. *Public Service*, 344 U.S. at 248. This is because "[f]ederal courts will not seize litigations from state courts merely because one, nominally a defendant, goes to federal court to begin his federal law defense before the state court begins the case under state law." *Id.*

There is an additional reason why the declaratory judgment remedy is inappropriate in this case. The Declaratory Judgment Act provides litigants with an affirmative federal remedy to be used *before* a potential breach of contract ripens into an actual breach of contractual duty. *Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989); MLA Amicus Brief at pp. 7, 11; IELA Amicus Brief at pp. 4, 20. London Underwriters claim to need a prompt adjudication of their legal rights under the policies in order to "fix" the legal relations of the parties and, if necessary, "adjust their conduct" in accord with a declaration from the court. Petitioners' Brief at p. 22. However, this is not the usual declaratory judgment scenario in which a coverage question prompts an insurer to defend its insured under a reservation of rights while contemporaneously filing a declaratory judgment action in order to determine the parties' rights and obligations under the policy. In this case, the relations and legal rights between the parties are already "fixed". London Underwriters have denied coverage to their insureds in connection with the Winkler County litigation and a judgment in excess of $100 million has been entered against

the Hill Group in that action. Thus, the breach of contract claim asserted in the state court action is ripe for determination, and it is too late for London Underwriters to now seek to adjust their conduct. As a result, this case simply is not an appropriate one for declaratory relief, and the decision to abstain was entirely appropriate.

C. Abstention Was Also Proper Under This Court's Holding in Brillhart.

This Court provided guidance for the exercise of discretion in declaratory judgment actions in *Brillhart*. Under *Brillhart*, a district court should not ordinarily exercise its discretion to hear a declaratory judgment action where there is another suit between the parties pending in state court that presents the same issues, not governed by federal law. *Brillhart*, 316 U.S. at 495. *See also Provident Tradesmens B&T Co. v. Patterson*, 390 U.S. 102, 126 (1968) (same).

The court's rationale in *Brillhart* had three principal bases: (1) avoidance of having federal courts needlessly determine issues of state law; (2) discouraging litigants from filing declaratory judgment actions as a means of forum shopping; and (3) avoiding duplicative litigation. *Chamberlain v. Allstate Ins.*, 931 F.2d 1361, 1366-67 (9th Cir. 1991). The case now before this Court demonstrates the sound policy underlying the *Brillhart* rationale and the reasons the trial court should be allowed to exercise its discretion in determining whether to hear declaratory judgment actions.

1. Granting Broad Discretion to the Trial Court Avoids Having Federal Courts Needlessly Determine Issues of State Law.

Federal courts should not needlessly determine issues of state law.[6] A system of judicial federalism has enough inherent friction with the state system without the added aggravation of unnecessary federal declarations. *See Mitcheson v. Harris*, 955 F.2d 235, 240 (4th Cir. 1992). As one court noted:

> To have sustained this suit for declaratory judgment would have been to drag this essentially local litigation into the federal courts and to defeat the jurisdiction of the state courts over it merely because one of the parties to the litigation happened to have indemnity insurance in a foreign insurance company.

Indemnity Ins. Co. v. Schriefer, 142 F.2d 851, 853 (4th Cir. 1944). Thus, even if a ruling by the district court on the declaratory judgment action clarified rather than confused the legal relationships of the parties:

> [T]his clarification will come at the cost of "increas[ing] friction between our federal and state courts and improperly encroach[ing] upon state jurisdiction." The states regulate insurance companies for the protection of their residents, and state courts are best situated to identify and enforce the public policies that form the foundation of such regulation.

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[6] This dispute is governed by issues of state insurance law, an area of the law Congress has expressly left to the states through the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-12 (1988).

Allstate Ins. v. Mercier, 913 F.2d 273, 279 (6th Cir. 1990). Absent a strong countervailing federal interest, the federal court should not elbow its way into this controversy to render what may be an "uncertain and ephemeral" interpretation of state law. *Penhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 122 n. 32 (1984).

2. Granting Broad Discretion to the Trial Court Discourages Litigants From Filing Declaratory Judgment Actions as Means of Forum Shopping.

The second *Brillhart* policy is the interest in avoiding the use by litigants of declaratory judgments actions as a means of forum shopping. One court has described this factor as relating to "the 'defensive' or 'reactive' nature of federal declaratory judgment suit[s]," and stated that if a declaratory judgment suit is defensive or reactive, that would justify a court's decision not to exercise discretion. *Transamerica Occidental Life Ins. Co. v. Digregorio*, 811 F.2d 1249, 1254 n. 4 (9th Cir. 1987).

Irrespective of the state law nature of insurance coverage disputes, diversity jurisdiction is frequently present in a suit for declaratory relief because the insurer and the insured are citizens of different states. *See Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1371 n. 4 (9th Cir. 1991). The potential for manipulation of diversity jurisdiction often underlies insurance companies' strategy of bringing declaratory judgment actions against their insureds to avoid being a defendant in non-removable state court actions presenting the same issues of state law. This practice is the archetype of what the Ninth Circuit

terms "reactive" litigation. *Digregorio*, 811 F.2d at 1254 n. 4. Reactive litigation can occur in response to a claim an insurance carrier believes is not subject to coverage even though the claimant has not yet filed a state court action: the insurer may anticipate that its insured intends to file a non-removable state court action, and rush to file a federal action before the insured does so. *See, e.g., Continental*, 947 F.2d at 1372; *Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94 (5th Cir. 1992), cert. granted, 113 S. Ct. 51 (1992), cert. dism'd, 113 S. Ct. 1836 (1993). Such anticipatory use of a declaratory judgment action is disfavored because it is an aspect of forum shopping.[7] *See Public Service*, 344 U.S. at 248; *American Auto. Ins. Co. v. Freundt*, 103 F.2d 613 (7th Cir. 1939) ("the wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or choose a forum.")

Such a preemptive strike is exactly what London Underwriters attempted in this case. The district court specifically found that by initiating what is here the first-

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[7] London Underwriters and the amicus parties each argue that abstaining in declaratory judgment actions constitutes treason to the Constitution because it enables a district court to decline to exercise its congressionally-conferred jurisdiction based upon diversity of citizenship. This argument is misplaced for two reasons. First, a declaratory judgment action, in and of itself, does not confer federal jurisdiction. *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). Second, as the IELA acknowledges, Congress has the power to restrict diversity jurisdiction, IELA Brief at pp. 18-19, and it effectively has done so by vesting the district courts with discretionary jurisdiction in declaratory judgment actions.

filed suit, London Underwriters were anticipating litigation from the Hill Group and attempting to forum shop when they initiated this lawsuit. J.A. 25. That finding is fully supported by the fact that London Underwriters filed this declaratory judgment action shortly after being notified of the adverse Winkler County jury verdict and irrespective of the fact that London Underwriters had already denied coverage to their insureds. Thus, even though London Underwriters filed suit in federal court before the Hill Group filed its state court action, they did so because they were aware of the Hill Group's claim and hoped to preempt any state court proceeding. Under these circumstances, London Underwriter's filing of their original declaratory judgment action was reactive notwithstanding the fact that it was the first-filed suit. *See e.g., Continental*, 947 F.2d at 1372-73.

Permitting this declaratory judgment to proceed when there is a pending state court case presenting the identical issue would encourage forum shopping races to the courthouse. The consequences of London Underwriters' argument that a district court cannot abstain if an insurance company decides to beat its insured to court would be virtually to license the preemptive strike by insurers so they can (1) fix venue they consider favorable or convenient to them and (2) promote, not avoid duplicative, piecemeal litigation. Furthermore, regardless of the degree of bad faith in which that declaratory judgment action is brought, the district court would have little or no discretion over whether to hear it.

3. Granting Broad Discretion to the Trial Court Avoids Duplicative Litigation.

The next *Brillhart* policy favors dismissal of declaratory judgment actions in favor of resolving all litigation stemming from a single controversy in a single court system. There is no sense, as a matter of judicial economy, for a federal court to entertain a declaratory judgment action when the result would be to "try a controversy by piecemeal, or to try particular issues without settling the entire controversy." *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937). As this Court wrote, for a federal court to charge headlong into the middle of a controversy which is the subject of state court litigation risks "[g]ratuitous interference with the orderly and comprehensive disposition of [the] state court litigation." *Brillhart*, 316 U.S. at 495. Here, the policy of avoiding duplicative litigation would be frustrated by permitting the federal action to go forward during the pendency of the state court action since London Underwriters have raised the same issues in the state court action that they have raised in this declaratory judgment action. *See* 17A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4247 (2nd ed. 1988).

There is another policy basis favoring discretion by federal district courts that relates to the harm caused by piecemeal adjudication. In many declaratory judgment actions brought to resolve a duty to defend or indemnify an insured, there will be overlapping issues of fact or law between the state and federal actions and a judgment by either court may be res judicata in the other. The existence of concurrent proceedings would thus create the

potential for an unseemly and destructive race to see which forum can resolve the same issues first, which race would be prejudicial "to the possibility of reasoned decision making by either forum." *See, Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 567-68 (1983). For example, if a federal court proceeds on a declaratory judgment action, an insured may be collaterally estopped from relitigating the overlapping issues decided in the federal action. *Mitcheson*, 955 F.2d at 239; Restatement (Second) of Judgments § 87 cmt. a (1982). Such issue preclusion would likely "frustrate the orderly progress" of state proceedings by leaving the state court with some aspects of the case closed from further examination but still other aspects in need of full scale resolution. *Phoenix Ins. Co. v. Harby Marina, Inc.*, 294 F. Supp. 663, 664 (N.D. Fla. 1969). Additionally, the state court will likely have to consult federal law to determine application of the preclusive principles. *See Harnett v. Billman*, 800 F.2d 1308, 1312-13 (4th Cir. 1986), cert. denied, 480 U.S. 2323 (1987). Thus, collateral estoppel principles will create further entanglement.

Ongoing parallel proceedings presenting the prospect of conflicting decisions are likely to lead to duplicative effort, wasted judicial resources and serve only to confuse matters, not resolve this dispute. Thus, the sound policy of avoiding duplicative litigation was best served by the district court's declining to exercise its jurisdiction in this case.

D. The Continuing Viability of the Declaratory Judgment Action Is Not Threatened by the Failure to Apply the Colorado River/Moses H. Cone Presumption of Jurisdiction.

London Underwriters contend that the *Colorado River/Moses H. Cone* presumption of jurisdiction must be applied to a declaratory judgment action in order to assure the continuing viability of the declaratory judgment action. This contention is premised on the misplaced notion that district courts have virtually unbridled discretion to decline to entertain actions for declaratory relief unencumbered by any meaningful appellate review.[8] Although, in the Fifth Circuit, a district court's discretion is broad, it is not unfettered. *Travelers Ins. Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774, 778 (5th Cir. 1993). Nor is appellate review in the Fifth Circuit limited to the perfunctory review solely for bias or capriciousness suggested by London Underwriters. *See*, Petitioners' Brief at pp. 14, 23. Rather, the Fifth Circuit has set forth six nonexclusive factors, derived in part from this Court's decision in *Brillhart*, to both guide district courts in deciding abstention issues in declaratory judgment

[8] London Underwriters are simply wrong in arguing that, under the existing Fifth Circuit standard, the mere personal disinclination of district judge to exercise jurisdiction in a declaratory judgment action due to, for example, a congested docket is unreviewable on appeal. Petitioners' Brief at pp. 14-15. The Fifth Circuit has specifically indicated that personal disinclination may not form the basis for a decision to defer the exercise of jurisdiction. *See, Travelers*, 996 F.2d at 778.

actions and to utilize in reviewing those decisions on appeal.[9] *Travelers*, 996 F.2d at 778.

That the failure to require application of the *Colorado River/Moses H. Cone* factors to the abstention determination in a declaratory judgment action will not endanger the continuing viability of the declaratory judgment action is evidenced by this case. In its stay order in this case, the district court weighed the factors relevant to the abstention decision and set forth its specific reasons for granting the stay. J.A. 23-26. The district court's specific findings coupled with the Fifth Circuit's review of those findings under the relevant abstention factors negates the conclusion drawn by London Underwriters that the failure to apply the *Colorado River/Moses H. Cone* factors to abstention analysis in declaratory judgment actions will lead to either arbitrary abstention determinations or appellate review solely for bias or capriciousness. Indeed, in light of the specific findings made by the district court

[9] London Underwriters complain that the six factor test formulated by the Fifth Circuit in *Travelers* does not incorporate three *Colorado River/Moses H. Cone* factors: (1) jurisdiction over real property; (2) the applicability of federal law; and (3) precedence of filing. Petitioners' Brief at p. 17, n. 18. The first two factors are not applicable in this case and the third factor actually supports abstention in light of the district court's determination that this action was filed in anticipation of litigation and as a means of forum shopping. *See* § III, *infra*. Moreover, in arguing that the Fifth Circuit erred in failing to apply these three *Colorado River/Moses H. Cone* factors, none of which weighs in favor of the district court's exercise of jurisdiction, London Underwriters have implicitly acknowledged that, if the courts below had expressly applied the exceptional circumstances test, abstention nevertheless would have been required.

in its stay order, the stay order would have been upheld regardless of the standard of review used and even if the *Colorado River/Moses H. Cone* factors did apply. *See* Sections II and III, *infra*.

Nor is there any basis for Petitioners' fear that the continuing viability of the declaratory judgment remedy is threatened by the action of the courts below in employing a *de facto* presumption that an insurer always acts preemptively in filing a declaratory judgment action any time an insured institutes a parallel state court action. Petitioners' Brief at pp. 17, 20, 23-25. The district court's specific findings that London Underwriters filed this suit "in anticipation of litigation after receiving notice of the Winkler County Verdict" and that, in filing this action, they were attempting to forum shop demonstrate that such a presumption was not employed in this case.[10]

E. Considerations of Federalism and Comity Cut in Favor of, not Against, Abstention in this case.

London Underwriters contend that considerations of federalism and comity compel application of the *Colorado*

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[10] The very case which London Underwriters interpret as standing for the proposition that an insurer always acts preemptively in filing a declaratory judgment action, *Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367 (9th Cir. 1991), was not cited by either the district court in its stay order or by the Fifth Circuit on appeal. Nor does *Robsac* even hold that an insurer always acts preemptively in filing a declaratory judgment action. Rather, *Robsac* merely recognizes the fact that an insurer's declaratory judgment action can be reactive, i.e., filed in anticipation of litigation and as a means of forum shopping, even where it is the first-filed suit. *Robsac*, 947 F.2d at 1372-73.

River/Moses H. Cone factors to this case. In support of this argument, London Underwriters cite a series of cases decided by this Court for the general proposition that a federal court plaintiff should not be deprived of a properly invoked federal forum. Petitioners' Brief at p. 23. These cases have no applicability here for two reasons. First, they do not address the issue of discretionary abstention in cases brought under the Declaratory Judgment Act. Second, London Underwriters' claim that federalism and comity concerns compel this Court to exercise jurisdiction in this case is precluded by the fact that London Underwriters improperly invoked the federal forum through their improper utilization of a declaratory judgment action asserting nothing more than defenses to the Hill Group's state court action. *Public Service*, 344 U.S. at 248.

II. A District Court's Decision to Abstain from Exercising its Jurisdiction in a Declaratory Judgment Action Should be Reviewed Under an Abuse of Discretion Standard; Regardless of the Standard of Review Applied, However, the District Court's Stay Order was Proper.

The Declaratory Judgment Act, 28 U.S.C. § 2201, provides:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. . . .

(emphasis added). Thus, the very terms of the Act and its subsequent interpretation by the courts have made the exercise of declaratory judgment jurisdiction discretionary. *See Cardinal,* 113 S. Ct. at 1974 n. 17; *Public Service,* 344 U.S. at 241; *Brillhart,* 316 U.S. at 494-96. The reason for giving this discretion to the district court is to enable the court to make a reasoned judgment whether the investment of judicial time and resources in a declaratory action will provide worthwhile in resolving a justiciable dispute. *Minnesota Min. and Mfg. Co. v. Norton Co.,* 929 F.2d 670, 672 (Fed. Cir. 1991).

This Court has not squarely addressed the issue of whether an abuse of discretion or a *de novo* standard of review applies to the review of the exercise of jurisdiction over a declaratory judgment action. Nevertheless, this Court, in reviewing such decisions, has employed an abuse of discretion standard. *See, Cardinal,* 113 S. Ct. at 1978 (finding that an appellate court abused its discretion in failing to exercise its jurisdiction to review a declaratory judgment entered by a district court). An abuse of discretion standard is also supported by *Kerotest Mfg. Co. v. C-O Two Fire Eqpt. Co.,* 342 U.S. 180, 183-84 (1952), wherein this Court recognized that the decision whether to exercise jurisdiction over a declaratory judgment action in a situation involving the existence of concurrent jurisdiction is not susceptible to a rigid, mechanical solution, but involves a consideration of various equitable factors, and, as a result, "an ample degree of discretion" necessarily must be left to the lower court. Adopting the *de novo* review standard advocated by London Underwriters would not only be contrary to the standard previously applied by this Court, it would also eliminate the

ample discretion delegated to district courts both under the Act and this Court's prior decisions in that the discretion of an appellate court would effectively be substituted for that of the district court.

London Underwriters correctly point out that there is a split among the circuits with regard to the appropriate standard of review of a district court's decision to stay or dismiss a declaratory judgment action. Petitioners' Brief at p. 11. Drawing analogies to, *inter alia* appeals of injunctions, Petitioners argue that a district court's abstention determination in a declaratory judgment action should be reviewed *de novo* by an appellate court.[11] Petitioners' Brief at p. 13. At the same time, however, Petitioners concede that abstention in a declaratory judgment action should be no different from any other type of abstention recognized by this Court. Petitioners' Brief at pp. 8, 13. Accordingly, Respondents submit that, in determining the appropriate standard of review of the abstention decision in a declaratory judgment action, this Court should look

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[11] The most appropriate of the analogies drawn by London Underwriters is the analogy to appeals of injunctions since, like a claim for declaratory relief, a claim for injunctive relief involves a discretionary, equitable remedy. However, this analogy actually supports the Hill Group's position that an abuse of discretion standard should be applied to the review of a district court's decision to entertain jurisdiction in a declaratory judgment action in that a district court's decision to grant or deny injunctive relief is reviewable under an abuse of discretion standard. *Caroline T. v. Hudson School Dist.,* 915 F.2d 752, 574 (1st Cir. 1990); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.,* 1995 W.L. 8240 (4th Cir. 1995); *E.E.O.C. v. Hacienda Hotel,* 881 F.2d 1504, 1519 (9th Cir. 1989); *Prows v. Federal Bureau of Prisons,* 981 F.2d 466, 468 (10th Cir. 1992), cert denied, 114 S. Ct. 98 (1993).

to the standard of review applied by appellate courts to a district court's determination of whether to abstain under the *Colorado River/Moses H. Cone, Burford, Pullman* and *Younger* abstention doctrines.[12]

A district court's decision to abstain under these abstention doctrines is typically reviewed for an abuse of discretion.[13] Indeed, this Court has applied an abuse of discretion review standard to cases arising under these abstention doctrines. *See Moses H. Cone*, 460 U.S. at 19 (*Colorado River* abstention); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965) (*Pullman* abstention). Similarly, the circuit courts of appeals are nearly unanimous that abstention decisions are reviewable under an abuse of discretion

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[12] *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) and *Younger v. Harris*, 401 U.S. 37 (1971).

[13] There is some authority that review of an abstention decision under the *Younger* doctrine is subject to *de novo* review even though an abuse of discretion standard applies to abstention decisions under the remaining abstention doctrines. *See, e.g., Trust & Investment Advisors, Inc. v. Hogsett*, ___ F.3d ___, 1994 W.L. 706102 (7th Cir. 1994); *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1081-82 (9th Cir. 1987). The *Hogsett* and *World Famous* decisions applied *de novo* review to *Younger* abstention cases in light of this Court's teaching in *Colorado River* that, when a case meets the *Younger* criteria, a district court must abstain. *Colorado River*, 424 U. S. at 816 n. 22. Thus, the *Hogsett* and *Tempe* courts reasoned that applying an abuse of discretion standard where no discretion exists would be inappropriate. Since this Court has made it clear that a district court has discretion to exercise jurisdiction in a declaratory judgment action, the rationale of *Hogsett* and *World Famous*, insofar as it applies to abstention under the *Younger* doctrine, is not applicable here.

standard.[14] *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 947 F.2d 529, 532 (1st Cir. 1991), cert. denied, 112 S. Ct. 1674 (1992) (*Colorado River* abstention); *Sheerbonnet, Ltd. v. American Express Bank, Ltd.*, 17 F.3d 46, 49 (2nd Cir. 1994), cert. denied, 115 S. Ct. 67 (1994); (*Burford* and *Colorado River* abstention); *Grode v. Mut. Fire Marine & Inland Ins. Co.*, 8 F.3d 953, 957 (3rd Cir. 1993) (*Burford, Colorado River* and *Younger* abstention); *Richmond, Fredericksburg & Potomac R. Co. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993) (*Burford, Younger* and *Colorado River* abstention); *American Bank & Trust Co. of Opelousas v. Dent*, 982 F.2d 917, 922 (5th Cir. 1993) (*Pullman* and *Burford* abstention); *Trust & Investment Advisors, Inc. v. Hogsett*, ___ F.3d ___, 1994 W.L. 706102 (7th Cir. 1994) (abuse of discretion standard of review applies to all forms of abstention other than *Younger* abstention); *Darsie v. Avia Group Int'l Inc.*, 36 F.3d 743, 745 (8th Cir. 1994) (*Colorado River* abstention); *American Int'l Underwriters, Inc. v. Continental Ins. Co.*, 843 F.2d 1253, 1256 (9th Cir. 1988) (*Colorado River* abstention); *Lind v. Grimmer*, 30 F.3d 1115, 1121 (9th Cir. 1994), cert. denied, ___ S. Ct. ___ (1994) (*Pullman* abstention); *Ramos v. Lamm*,

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[14] Certain cases do review *de novo* whether a given case meets the requirements of a particular abstention doctrine, reasoning that such a question is a matter of law for the court subject to *de novo* review. Nevertheless, these cases hold that, once the requirements of a particular abstention doctrine are met, a district court's abstention decision is reviewed for an abuse of discretion. *See, e.g., Sheerbonnet, Ltd. v. American Express Bank, Ltd.*, 17 F.3d 46, 48 (2nd Cir. 1994), cert. denied, 115 S. Ct. 1674 (1994); *Grode v. Mut. Fire Marine & Inland Ins. Co.*, 8 F.3d 953, 957-58 (3rd Cir. 1993); *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359, 360 (9th Cir. 1993), cert. denied, 114 S. Ct. 1052 (1994).

639 F.2d 559, 564 n. 4 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); *Rindley v. Gallagher*, 929 F.2d 1552, 1554 (11th Cir. 1991) (*Pullman* and *Burford* abstention). Thus, in order to ensure that declaratory judgment abstention is treated uniformly with other types of abstention previously recognized by this Court, a district court's decision to abstain from exercising its jurisdiction in a declaratory judgment action should be subject to review under an abuse of discretion standard, not by *de novo* review.[15]

Petitioners' contention that the abuse of discretion standard employed by the Fifth Circuit leaves "litigants with no meaningful protection against the whim or personal disinclination of a district court" is misplaced. Petitioners' Brief at p. 8. As previously discussed in Section I D, *supra*, broad discretion does not equate to absolute discretion, and the Fifth Circuit has formulated at least six non-exclusive factors to be considered in determining whether abstention in a declaratory judgment action is appropriate. *See, Travelers*, 996 F.2d at 778. Thus, there simply is no basis for concluding either in this case or in general that appellate review under an abuse of discretion standard "is tantamount to no review of the abstention decision". Petitioners Brief at p. 8.

The Fifth Circuit's failure to review the district court's decision to stay by *de novo* review is not outcome

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[15] An analogy not suggested by London Underwriters which supports the adoption of an abuse of discretion standard is that drawn by the Fifth Circuit to the abuse of discretion standard of review applied by this Court to dismissals under the forum non conveniens doctrine. *See Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 n. 2 (5th Cir. 1983).

determinative of this appeal in any event. This is because the stay order would have been upheld regardless of the standard of review used. As discussed above, this Court has determined that (1) a federal court will not entertain a claim for declaratory relief where to do so would be to seize litigation from a state court merely because the state court defendant attempts to begin his defense through the filing of a claim for declaratory relief in federal court, *Public Service*, 344 U.S. at 248, and (2) a district court should not ordinarily exercise its discretion to hear declaratory judgment actions where there is another suit between the parties pending in state court that presents the same issues, not governed by federal law. *Brillhart*, 316 U.S. at 495.

De novo review of the district court's abstention order would have resulted in affirmance of the district court's stay order even disregarding the holdings in *Brillhart*, *Public Service* and their progeny. First, there is no dispute that this insurance coverage dispute is governed by state law. Second, the district court correctly concluded that Petitioners brought this action in anticipation of litigation and that entertaining jurisdiction over this declaratory judgment action would reward Petitioners' attempts to forum shop. Finally, the courts below properly recognized that declining the exercise of jurisdiction in this case would avoid piecemeal, duplicative litigation. Review of these factors by *de novo* review rather than by an abuse of discretion standard simply would not change the result. Accordingly, even if a *de novo* review standard were to be adopted, no basis would exist for reversing the Fifth Circuit's affirmance of the district court's stay order.

III. Even if the Colorado River and Moses H. Cone Factors Apply, the Trial Court Properly Addressed Those Factors in Refusing to Exercise its Jurisdiction.

Petitioners argue that the Fifth Circuit should have applied the factors set forth in *Colorado River* and *Moses H. Cone* to determine whether the stay was proper. As demonstrated above, these factors have no applicability to an action brought under the Declaratory Judgment Act. Even if the *Colorado River* and *Moses H. Cone* factors were applied in this case, however, the district court properly determined to refuse to exercise jurisdiction.

Under *Colorado River* and *Moses H. Cone*, the following factors are to be considered in determining whether to abstain from hearing a case due to the pendency of a similar state court action: (1) avoiding the exercise of jurisdiction over particular property by more than one court; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) the applicability of federal or state law to the merits of the claims at issue; and (6) the adequacy of state court proceedings to protect the rights of the party that invoked the federal court's jurisdiction. *Moses H. Cone*, 460 U.S. at 15-16; *Colorado River*, 424 U.S. at 818-19. These factors themselves run "substantially parallel" to the criteria that historically have been deemed relevant in determining whether to accept or decline jurisdiction under the Declaratory Judgment Act. *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 309 n. 3 (1st Cir. 1986). Thus, to the extent these factors were to apply in this case, they likewise support the district court's refusal to exercise jurisdiction.

A. The First Colorado River/Moses H. Cone Factor, Jurisdiction Over Real Property, is Irrelevant in This Case.

The first factor set forth in *Colorado River* is not an issue in this case because there is no issue of jurisdiction over real property. Contrary to Petitioners' position, neither *Colorado River* nor *Moses H. Cone* indicate that, if one of the abstention factors set forth in those cases is absent, such absence weighs against abstention. *Employers Ins. of Wausau v. Missouri Elec. Works*, 23 F.3d 1372, 1375 n. 4 (8th Cir. 1994); *Arkwright-Boston Mfrs. Mut. v. City of New York*, 762 F.2d 205, 210 (2nd Cir. 1985). Rather, missing factors do not tip the scales against abstention. *Employers*, 23 F.3d at 1375; *Arkwright*, 762 F.2d at 210; *American*, 843 F.2d at 1257-58. Thus, the jurisdiction over real property factor is irrelevant and should not be given any consideration in the abstention analysis. *Id.*; *Lumberman's Mut. Cas. v. Connecticut Bank & Trust*, 806 F.2d 411, 414 (2nd Cir. 1986).

B. Litigating This Dispute in Federal Court is No More Convenient than Litigating This Dispute in State Court.

The second *Colorado River* factor weighs the convenience of the respective forums. *Colorado River*, 424 U.S. at 818. This factor, like the first factor, is neutral in this case because the competing forums are equally inconvenient to all parties. Respondents are each located in Dallas County, Texas. R II 105-106. Petitioners are each located in England. R II 105. As a result, litigating this dispute in federal court in Houston, Texas would be no more convenient than litigating this dispute in the Texas state courts.

See, e.g., Arkwright, 762 F.2d at 210 (finding the inconvenience of the federal forum factor to be inapplicable where the state and federal courthouses were across the street from one another). The convenience of the respective forums factor thus does not weigh in favor of the exercise of jurisdiction by the district court. *Employers*, 23 F.2d at 1375 n. 4. Accordingly, this factor is irrelevant and should not be given any consideration in the abstention analysis. *Lumberman's*, 806 F.2d at 414; *American*, 843 F.2d at 1257-58; *Arkwright*, 762 F.2d at 210.

London Underwriters argue that, since venue over the state court action instituted by the Hill Group was subsequently transferred to Harris County, the district court erred in staying this action in deference to the state court action. This argument overlooks the fact that venue objections to the second-filed action are properly addressed to the court with jurisdiction over the second-filed action, not the court in which the first-filed declaratory judgment action is pending. *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 750 n. 6 (7th Cir. 1987). The question of whether venue of the state court action was proper in Travis County was simply irrelevant to the district court's determination of whether to exercise jurisdiction in this action because: (1) London Underwriters had a remedy available to them in the state court proceeding in that they were free to seek a transfer of venue; and (2) the district court would still have to address the issue of whether to exercise jurisdiction in this case or stay the case in deference to the state court proceeding instituted by the Hill Group.[16]

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[16] Petitioners' argument that the transfer of venue in the state court action from Travis to Harris County somehow indicates that the district court erroneously concluded that Petitioners had not engaged in forum shopping is likewise misplaced. The forum shopping of which the Hill Group complained was Petitioners' filing a preemptive declaratory judgment action in federal court in an effort to deprive their insureds of a state court forum.

C. The Piecemeal Litigation Factor Weighs in Favor of Abstention.

Colorado River abstention is concerned with wise judicial administration, conserving scarce judicial resources and facilitating the comprehensive disposition of litigation. *Colorado River*, 424 U.S. at 817. The district court's stay of this action complies with the goals of this abstention doctrine by averting piecemeal adjudication of this coverage dispute. While not specifically applying the *Colorado River* piecemeal abstention factor to the district court's stay order, the Fifth Circuit nevertheless addressed the piecemeal litigation factor and also concluded that this factor supported abstention. J.A. 30.

This determination is fully supported by the record. In the first place, the state court action is obviously the more comprehensive action in terms of the number of parties before the court in that the claims of the Hunt Group, the Hill Group's co-judgment debtors in the Winkler County litigation, against their insurers have been properly joined with the Hill Group's claims against London Underwriters. Moreover, the state court action instituted by the Hill Group is the more comprehensive of the two actions in terms of the claims presented in that it includes claims for breach of contract, declaratory relief, injunctive relief and bad faith whereas this action presents only a claim for declaratory relief.

London Underwriters argue that, if the Hill Group were required to file an answer in this action, application of the compulsory counterclaim rule would result in all issues between the Hill Group and London Underwriters being before the district court below. This argument is misplaced for three reasons. First, it contravenes this Court's teaching that a federal court should not exercise jurisdiction over a declaratory judgment action where, as here, the action merely asserts a defense to an impending state court action by the declaratory judgment defendant. *Public Service*, 344 U.S. at 248. Second, this argument does little to advance London Underwriters' position that the district court erred in staying this action since maintaining virtually identical suits in two forums under these circumstances would still give rise to the concerns underlying the piecemeal litigation factor, i.e., waste of judicial resources and duplicative effort. *See, e.g., Arizona*, 463 U.S. at 565-569.[17] Finally, the Hill Group's filing of an answer containing a breach of contract counterclaim would effectively moot London Underwriters' complaint for declaratory relief since declaratory relief will not be granted where a more appropriate remedy exists. *Dresser Industries, Inc. v. Ins. Co. of N. Am.*, 358 F. Supp. 327 (N.D. Tex. 1973), aff'd 475 F.2d 1402 (5th Cir. 1973); *Navistar Int'l Corp. v. Emery*, 643 F. Supp. 515 (N.D. Tx. 1986). Since the Hill Group's breach of contract claim is a more appropriate and/or effective remedy to address an actual

[17] The First, Second, Eighth and Ninth Circuits have likewise recognized that piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating effort and possibly reaching different results. *See, Fuller*, 782 F.2d 309-10; *Arkwright*, 762 F.2d at 211; *Employers*, 23 F.3d at 1375; *American*, 843 F.2d at 1258.

wrong already committed, *i.e.* London Underwriters wrongful declination of coverage, the likely result of refusing to stay this action in favor of the state court action would have been dismissal of London Underwriters' claim for declaratory relief in favor of the Hill Group's ripened breach of contract counterclaim with the consequent result that the Hill Group would, for all practical purposes, be pursuing duplicative, piecemeal claims as a plaintiff both in this action and in the state court action.

London Underwriters next argue that judicial economy will best be served by allowing this case to proceed because the bad faith claims asserted in the state court proceeding will not be reached if London Underwriters are successful in obtaining a summary judgment in this action that no coverage exists under the policies. London Underwriters' speculative argument that they will be successful on a motion for summary judgment in the district court does not mean that judicial economy would be achieved. In fact, the opposite may be true since even if such a summary judgment were granted, the bad faith claims in the state court proceeding would not necessarily be mooted.[18] Thus, judicial economy will best be served by proceeding with the more comprehensive state court proceeding in which the bad faith claims are already before the court. The district court properly recognized this in finding that its exercise of jurisdiction

[18] Under Texas law, it is unclear whether a finding of policy coverage is a prerequisite to maintaining a bad faith claim. Compare *Viles v. Security Nat'l Ins. Co.*, 788 S.W.2d 566, 567 (Tex. 1990) and *Republic Ins. Co. v. Stoker*, 867 S.W.2d 74, 79 (Tex. App. – El Paso 1993, writ pending) with *Cluett v. Medical Protective Co.*, 829 S.W.2d 822, 830 (Tex. App. – Dallas 1992, writ denied.)

over this declaratory judgment action would result in piecemeal litigation.

London Underwriters further speculatively argue that judicial economy would result from the district court's exercise of jurisdiction in this case since it is "the practice in Texas to abate the claims for breach of the duty of good faith, pending resolution of the coverage issues. . . . " Petitioners' Brief at p. 30. London Underwriters' contention that they are entitled as a matter of right to proceed separately on the coverage issue has been rejected by a number of Texas state courts. *See e.g., Allstate Ins. Co. v. Hunter*, 865 S.W.2d 189 (Tex. App. – Corpus Christi 1993, orig. proceeding); *Progressive County Mutual Ins. Co. v. Parks*, 856 S.W.2d 776 (Tex. App. – El Paso 1993, orig. proceeding).[19] Indeed, the Texas Supreme Court has recognized that contractual and bad faith claims should be tried together when possible. *Arnold v. National County*

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[19] In fact, two of the cases cited by London Underwriters in support of their alleged right to a severance of the bad faith claims from the contractual coverage claims, *State Farm Mutual Ins. Co. v. Wilborn*, 835 S.W.2d 260 (Tex. App. – Houston [14th Dist.] 1992, no writ) and *United States Fire Ins. Co. v. Millard*, 847 S.W.2d 668 (Tex. App. – Houston [1st Dist.] 1993, original proceeding), were recently distinguished in both *Parks* and *Hunter* on the grounds that both *Wilborn* and *Millard* turned on the effect of introducing evidence of settlement offers made by the insurer which were clearly relevant to the bad faith claims but would have been prejudicial if considered in connection with the breach of contract claims. This consideration is not at issue in this case since no settlement offers were made as a result of the fact that London Underwriters' wrongfully declined coverage. Thus, there is no evidence relevant to one claim which would be prejudicial to the other claims, and a severance would not avoid prejudice, but would only serve to prolong the litigation.

Mutual Fire Ins. Co., 725 S.W.2d 165, 168 n.1 (Tex. 1987). Since a severance of the contractual coverage from the bad faith claims in the state court proceeding is not likely under the facts of this case, London Underwriters' speculative argument that judicial economy will be achieved due to an inevitable severance in the state court proceeding is without merit. Likewise, the fact that the Texas Supreme Court in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 29-30 (Tex. 1994) recently authorized a bifurcated trial on the issue of the amount of punitive damages does not lead to the conclusion that judicial economy will be better served in the federal court system since the bifurcated trial contemplated by *Moriel* is one to be conducted immediately following a jury's determination of liability for punitive damages, not as a separate proceeding at some undetermined future date. Moreover, the bifurcation authorized by *Moriel* is designated to protect, not penalize, defendants and such bifurcation would only occur if London Underwriters asked the state court to bifurcate the trials.

Finally, London Underwriters make the unusual argument that piecemeal litigation results from the fact that they are not named as parties to the two consolidated actions pending in Dallas County between the Hill Group and an entirely separate set of insurers.[20] The consolidated Dallas

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[20] At the same time London Underwriters decry the fact that they were not joined as parties to the litigation between the Hill Group and their other insurers in Dallas County, they simultaneously complain of the joinder of claims against the Hunt Group's insurers in the state court action even though the claims against the Hunt Group's insurers, like the claims against the Hill Group's other insurers in the Dallas County litigation, arise out of the same underlying lawsuits. See Petitioners' Brief at pp. 6, 9, 38.

County suits involve the interpretation of a number of policies which are not at issue in either this litigation or the parallel state court proceeding between the parties in this case. London Underwriters misconstrue the piecemeal litigation test by attempting to apply it to a dispute to which they are not named as parties.

The relevant inquiry faced by the district court was whether piecemeal litigation of the dispute between the parties to this action would result if jurisdiction were exercised in this case, not whether the Hill Group could have brought their claims against London Underwriters in the consolidated Dallas County actions. This point is illustrated by both *Fuller* and *Lumberman's*. Both the *Fuller* and *Lumberman's* courts, in construing the avoidance of piecemeal litigation factor, noted that the concerns raised by this factor are the avoidance of unnecessary complication and fragmentation of the trial of cases and the causing of friction between state and federal courts. *Fuller*, 782 F.2d at 310; *Lumberman's*, 806 F.2d at 414. The Dallas County litigation simply does not raise any concern of piecemeal litigation of this dispute since London Underwriters are not parties to that litigation and there is no possibility of fragmented proceedings or friction between the Dallas County state court and the federal court below. Thus, the existence of the consolidated Dallas County actions is simply irrelevant to whether piecemeal adjudication of the dispute between the parties in this case would result if the trial court had chosen to exercise its discretionary jurisdiction.

D. Petitioners' Preemptive Filing of this Action Does Not Support the Exercise of Jurisdiction in the District Court.

The fourth *Colorado River* factor, the order in which jurisdiction was obtained, also favors abstention.

Petitioners argue that the mere fact that their suit was on file first compelled the district court to exercise its jurisdiction. In *Moses H. Cone*, however, this Court made it clear that priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions. *Moses H. Cone*, 460 U.S. at 21. At the time the stay order in this case was entered, the case had not progressed beyond the Hill Group's filing of their Rule 12 motion. If anything, the state court case had progressed further in that Petitioners had filed their answer in that proceeding. R I 213. In truth, however, both this case and the state court action were still in their embryonic stages at the time of the stay. Thus, this simply is not a case in which the declaratory judgment plaintiffs had devoted substantial time and energy to the litigation prior to the time the case was stayed, and the district court thus acted well within its discretion in staying the case.

There is an additional reason why the order in which jurisdiction was obtained factor favors abstention in this case. The district court specifically found that the original filing of this declaratory judgment action in December, 1992 was done in anticipation of litigation and as a means of forum shopping after London Underwriters received notice of the Winkler County verdict. J.A. 25. Where a preemptive action is filed in anticipation of litigation as a means of forum shopping, the fact that such action is the first on file weighs against, not in favor of, the district court's exercise of jurisdiction. *See, Moses H. Cone*, 460 U.S. at 21 (finding that the party initiating the second-filed action had "no reasonable opportunity" to file its suit prior to the preemptive action).

The district court's findings that this action was filed in anticipation of litigation and as a means of forum shopping were fully supported by Petitioners' admissions both in their briefing and in oral argument before the district court that it was their receipt of notice of the verdict in the Winkler County action which was the triggering event which led them to file their original declaratory judgment action. R I 220-21; R III 17. Notwithstanding these admissions, Petitioners now argue that the courts below erroneously concluded that this action was filed in anticipation of litigation and as a means of forum shopping because Petitioners denied coverage prior to the filing of their declaratory judgment action. This argument is misplaced for the reason that it was not until the time that the Winkler County jury returned its verdict *and* a judgment was subsequently rendered thereon that the coverage issues in this case were fully ripened.[21] Indeed, Petitioners were in such a race to get their preemptive declaratory judgment suit on file that they did not even wait until the Winkler County court entered a judgment on the jury's verdict, thereby ripening the coverage question.[22]

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[21] It is well-established Texas law that a claim for declaratory relief as to whether an insurer is obligated to indemnify its insured is premature and will not lie until such time as the insured's liability has been determined. *See Fireman's Ins. Co. of Newark, N.J. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1969).

[22] By contrast, the Hill Group's other insurers apparently recognized that the indemnification issue was not ripened until a judgment was entered on the jury verdict as they instituted litigation in Dallas County against the Hill Group in February, 1993, within just a couple of days after the entry of the Winkler County judgment.

Nor is the district court's decision distinguishable on the basis that the Hill Group did not "demand coverage" between the date petitioners initially denied coverage and the date London Underwriters filed their original declaratory judgment action. In the first place, the policies do not require the Hill Group to formally "demand coverage". Rather, the policies simply require the Hill Group to provide its insurers notice of a claim by sending them copies of legal papers (such as the jury verdict) received in connection with the claim. R II 23, Section IV, ¶ 2(c)(1). Second, by providing Petitioners with notice of the Winkler County jury verdict in the face of the prior declination of coverage, it was clear that the Hill Group disagreed with Petitioners' position that no coverage existed under the policies. Thus, the operative event in determining whether Petitioners' complaint for declaratory relief was filed in an effort to beat their insureds in a race to the courthouse is Petitioners' receipt of notice of the Winkler County verdict in late November, 1992, not the date upon which they wrongfully declined to provide a defense to their insureds. Indeed, the very fact that Petitioners felt it necessary to institute suit in the face of their prior declination of coverage belies their position that this situation was not a race to the courthouse.

E. There is No Significant Federal Interest in This Suit.

It is undisputed that state law governs resolution of this coverage dispute and that "no federal issues or interest are implicated in this coverage dispute." Petitioners' Brief at p. 34. Under *Colorado River* abstention analysis, the absence of federal issues may not require a district

court to surrender its jurisdiction, but it nevertheless does favor abstention where, as here, the bulk of the litigation revolves around the state law rights of the parties. *General Reinsurance Corp. v. CIGA-Geigy Corp.*, 853 F.2d 78, 82 (2nd Cir. 1988), citing *Moses H. Cone*, 460 U.S. at 23, n. 29. Moreover, in the declaratory judgment context, this Court has made it clear that when there is another suit pending in state court presenting the same issues, not governed by federal law, between the same parties, a district court's discretion to grant relief under the Declaratory Judgment Act ordinarily should not be exercised. *Brillhart*, 316 U.S. at 495. The absence of an issue of federal law in this case thus counsels in favor of the district court's decision to decline to exercise its jurisdiction.

F. Petitioners' Rights are Adequately Protected in the State Court Proceeding.

The final *Colorado River/Moses H. Cone* factor, the adequacy of the state court forum to protect the rights of London Underwriters, militates in favor of the district court's stay order. The district court, in finding that Petitioners could assert their claims in this action as defenses or counterclaims in the state court proceeding, properly recognized that London Underwriters' rights would be protected in the state court proceedings. Petitioners likewise have acknowledged that the state court is competent to resolve the legal issues presented by Petitioners' declaratory judgment action. Petitioners' Brief at p. 35. Thus, the adequacy of the state court forum factor provides no basis to support the district court's retention of jurisdiction in this case.

Notwithstanding their concession that the Texas state courts are competent to protect their rights, London Underwriters raise a myriad of alleged reasons why the district court would be a better forum in which to litigate this dispute.[23] Most, if not all, of the reasons advanced by Petitioners as to why the district court would constitute a better forum are not actually addressed to the adequacy of the state court forum. Instead, London Underwriters have set forth an exhaustive listing of the reasons behind their preference for litigating this dispute in federal court. These very same reasons are presumably what lead London Underwriters to attempt to forum shop by initiating this action as a preemptive first strike. In any event, the reasons underlying London Underwriters' preference for a federal court forum do not mean that the state court forum is inadequate to protect their rights.

London Underwriters first argue that the fact that venue over the state court proceeding was subsequently transferred to Harris County somehow compels the conclusion that the state court proceedings were inadequate to protect London Underwriters' rights. As previously discussed, the question of whether venue over the state court proceeding was proper was a matter properly addressed to the state courts and was not relevant to the district court's determination whether it should exercise jurisdiction in this case. *See, Tempco*, 819 F.2d at 750. The

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[23] This, of course, is not the test under the sixth *Moses H. Cone* abstention factor, and, contrary to Petitioners' interpretation, nowhere in *Cone* did this Court indicate that the state court must be "better qualified" to handle an action in order to support abstention under this factor.

fact that the Travis County court, at the request of London Underwriters, ultimately transferred venue to Harris County, if anything, is evidence that the state courts were in fact protecting London Underwriters' rights. There simply is no basis for concluding that the fact that venue over the state court action was transferred from one county to another somehow rendered the state courts inadequate to protect London Underwriters' rights.

London Underwriters next contend that the state court proceeding is inadequate to protect their substantive rights because it may take longer than twenty-one months, the median time interval between filing and disposition for cases in the United States federal courts in the Southern District of Texas, for the state court action to get to trial. In the first place, this is not necessarily the case. It is not at all unusual for cases filed in Texas state courts to be heard within eighteen to twenty-four months of their original filing date. Moreover, in the Texas state court system, unlike the federal system, jurisdiction over civil and criminal matters is divided between civil and criminal trial courts. Speedy trial and other constitutional concerns often require that federal courts give preference to their criminal docket at the expense of their civil docket. This would not be a concern in the state court action. Thus, other than sheer speculation, there is no basis to determine whether this dispute will be reached earlier in federal court than it will in state court.

Nor do the discovery concerns raised by London Underwriters render the state court proceeding inadequate to protect their rights. In this regard, London Underwriters first contend that the need to resort to certain alleged international treaties governing foreign discovery renders the state court proceeding inadequate. However, London Underwriters cite no authority establishing that a state court is precluded from interpreting any such treaties nor any authority demonstrating any particular expertise of a federal district court in making such interpretations. London Underwriters also make the interesting argument that the federal court will better be able to protect them when they fail to make proper discovery since the Texas Rules of Civil Procedure authorize state courts to enter death penalty sanctions against a party who engages in abusive discovery tactics. Though this is a revealing admission of London Underwriters' intentions regarding discovery, such admission does little to advance London Underwriters' position since federal district courts are likewise authorized to enter death penalty sanctions against a party who fails to comply with a discovery order.[24] *See* Fed. R. Civ. P. 37(b)(2)(c).

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[24] Texas Rule of Civil Procedure 215(2)(b)(5), by its express terms, appears to authorize an award of death penalty sanctions upon the failure of a party to comply with either a discovery order or a proper discovery request. As interpreted by Texas courts, however, before entering death penalty sanctions against a litigant for abusive discovery tactics, a trial court must first test lesser sanctions in an attempt to secure compliance, deterrence and punishment of the offender. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992). Thus, in practice, there is little difference in how London Underwriters' contemplated discovery abuses will be treated under the two rules.

London Underwriters next speculatively argue that the state court forum is inadequate because they are less likely to be awarded a summary judgment under Texas state court procedural practice than they would be in federal court. While this subjective belief may explain London Underwriters' preference for a federal court forum, it hardly renders the state court forum inadequate to protect London Underwriters' substantive rights. Quite simply, alleged procedural differences under the Federal and Texas Rules of Civil Procedure do not mean that London Underwriters' substantive rights will not be adequately protected in the state court proceeding. The argument is misplaced in any event because Texas courts have not been reluctant to grant summary judgments to insurers in coverage disputes where the insurer's obligations under a policy present a matter of law for the court to determine. *See e.g., Clemons v. State Farm Fire & Cas. Co.*, 879 S.W.2d 385, 393 (Tex. App. – Houston [14th Dist.] 1994, n.w.h.); *Adamo v. State Farm Lloyd's Co.*, 853 S.W.2d 673 (Tex. App. – Houston [14th Dist.] 1993, writ denied), cert. denied, 114 S. Ct. 1613 (1994); *Maayeh v. Trinity Lloyd's Ins. Co.*, 850 S.W.2d 193 (Tex. App. – Dallas 1992, no writ); *Cluett v. Medical Protective Co.*, 829 S.W.2d 822 (Tex. App. – Dallas 1992, writ denied). There certainly is no procedural bar to London Underwriters filing their proposed summary judgment motion in the state court proceeding, and, as indicated by the above-cited cases, Texas state courts do not hesitate to grant summary judgments to deserving insurers. Accordingly, there is no basis for concluding that London Underwriters' rights will not be adequately protected in the state court proceeding.

London Underwriters' final argument that the state court proceeding is inadequate to protect their rights is

based on the fact that the claims of the Hunt Group against their insurers arising out of the Winkler County litigation are also asserted in the state court action. London Underwriters cite no authority to support their position that such a joinder of parties is improper or, even if it was, that this factor weighs in favor of the exercise of jurisdiction by the district court.[25] In fact, such joinder was entirely proper for the reasons discussed above. In any event, as was true of their contention that venue of the state court proceeding was improper in Travis County, London Underwriters' objections to the joinder of the claims of the Hill and Hunt Groups against their respective insurers can be remedied by filing a motion for severance and/or a motion for separate trials in the state court proceeding. London Underwriters' objections in this regard are properly addressed to the state court and do not compel the conclusion that the district court was required to exercise its jurisdiction in this case. *See, e.g., Tempco*, 819 F.2d at 750 n. 6.

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[25] Interestingly, at the same time London Underwriters decry the fact that the claims of the Hunt Group against its insurers arising out of the Winkler County litigation have been joined in the state court action, they simultaneously take the position that the Hill Group's claims against London Underwriters should have been brought in the Dallas County litigation. *See* Petitioners' Brief at pp. 31-32. Presumably, if the Hill Group had done this, London Underwriters would then argue, as they do at page 38 of their brief, that the joinder of the bad faith claims two separate sets of insurers in the Dallas County litigation would have been prejudicial to London Underwriter, thereby entitling them to a severance in the Dallas County litigation.

CONCLUSION

For the reasons discussed herein, the Court should determine that the exceptional circumstances test has no applicability to the abstention determination in a declaratory judgment action and that a district court's decision to abstain is subject to review under an abuse of discretion standard. However, under the facts of this case, the judgment and opinion of the United States Court of Appeals for the Fifth Circuit should be affirmed in any event since, regardless of the standard of review applied, abstention was also appropriate under the *Colorado River/Moses H. Cone* exceptional circumstances test.

Respectfully submitted,

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